No. 92-1956

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In The

Supreme Court of the United States

October Term, 1992

CONSOLIDATED RAIL CORPORATION,

Petitioner,

vs.

JAMES E. GOTTSHALL and ALAN CARLISLE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR AMICI CURIAE NEW JERSEY TRANSIT RAIL OPERATIONS, INC. AND SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE AMICI CURIAE

The *amici curiae* are public entities which provide interstate public rail transportation in New Jersey, New York and Pennsylvania. New Jersey Transit Rail Operations, Inc. operates commuter rail service throughout New Jersey and into New York City. The Southeastern Pennsylvania Transportation Authority

(SEPTA) operates similar service in Pennsylvania and into New Jersey. The *amici* have a significant and vital interest in the resolution of the issue in this case, specifically whether the Federal Employers' Liability Act (FELA), 45 U.S.C.A. § 51 *et seq.*, permits railroad employees to maintain an action for emotional injury due to stress created by general work conditions where there is no evidence of any physical impact or threat of physical impact. The decisions of the Court of Appeals for the Third Circuit in *Gottshall v. Consolidated Rail Corporation*, 988 F.2d 355 (3d Cir. 1993), and *Carlisle v. Consolidated Rail Corporation*, 990 F.2d 90 (3d Cir. 1993), represent a significant and dramatic departure from the principles that have heretofore governed FELA emotional injury actions in that Circuit and unquestionably represent a broadening of the circumstances when liability will be imposed under the Act.

The principles announced in these cases will undoubtedly open the door to the award of monetary judgments against the *amici* and other interstate carriers operating in the Third Circuit. For publicly run railroads like New Jersey Transit and SEPTA, this expansion of liability will necessarily divert limited resources from other vitally important needs of these transportation systems and potentially require a call for greater governmental subsidization, higher fares or service reductions.

SUMMARY OF ARGUMENT

Under the FELA, employees of every railroad may recover for injuries sustained due to the negligence of his or her employer. 45 U.S.C.A. § 51. In *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), the Court refused to determine whether wholly emotional injuries arising from work conditions were compensable under the Act. The Court noted, however, that FELA jurisprudence "gleans guidance from common-law developments." *Id.* at 568. Following this decision, the courts of

appeal have divided sharply on the standards that govern recovery for the negligent infliction of emotional distress. The consequence has been a series of conflicting opinions on a significant issue of federal law. On this important and recurring question, there is a compelling need for the Court to announce a uniform rule. *See Ray v. Consolidated Rail Corp.*, 112 S. Ct. 914 (1992) (White and Thomas, JJ., dissenting from the denial of *certiorari*).

The need for review by the Court is particularly acute because the Third Circuit has in these cases adopted the most extreme and expansive approach taken by the courts of appeal on this question. The Third Circuit determined that a cause of action for emotional distress would be cognizable under FELA "when it is reasonably foreseeable that extended exposure to dangerous and stressful working conditions will cause injury to the worker . . . ." *Carlisle, supra*, 990 F.2d at 97. This approach has absolutely no basis in the common law. The holding of the Third Circuit will substantially broaden the circumstances when employers will be liable under the Act.

ARGUMENT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE CIRCUITS ARE IN SHARP CONFLICT AND REQUIRE GUIDANCE ON THE ISSUE OF NEGLIGENT INFLICTION OF EMOTIONAL HARM UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

In *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), this Court noted that recovery for emotional injury under the FELA should be guided by the common law and would require a fact-sensitive examination of "the nature of the injury and the character of the tortious activity." *Id.* at 568. The Circuits have

responded to this invitation to develop an approach to FELA claims for emotional injury by creating sharply divergent rules of law. However, with the exception of the Third Circuit's recent decision in *Carlisle*, each Circuit looked to the common law for guidance and closely examined the employer's tortious activity when deciding the case.

Presently, recovery for emotional injury under the FELA depends on which Circuit suit is brought in; some plaintiffs' burdens are light and some are heavy. A railroad worker who brings a FELA suit for emotional injury in the Fourth Circuit must prove that the employer engaged in unconscionable or outrageous conduct. *Elliot v. Norfolk & W. Ry. Co.*, 910 F.2d 1224, 1229 (4th Cir. 1990). Similarly, a FELA plaintiff in the Sixth Circuit must be the victim of "unconscionable abuse" to recover for emotional injuries. *Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539-40 (6th Cir. 1990).

However, a railroad worker seeking recovery for emotional injury in a FELA suit in the Fifth Circuit must be in the "zone of danger" and fear for his or her own safety during a distressful incident. *Gaston v. Flowers Transp.*, 866 F.2d 816, 817 (5th Cir. 1989). If a worker is subjected to physical impact or the threat of physical impact during an incident, then recovery for emotional injury may be obtained in the Seventh Circuit. *Ray v. Consolidated Rail Corp.*, 938 F.2d 704, 705 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 914 (1992).

Though conflicting, the respective principles espoused in each of these cases are solidly grounded in the common law. The Fourth and Sixth Circuits adopted the common law test involving outrageous conduct. *See Restatement (Second) of Torts* § 46(d) (1965). The Fifth and Seventh Circuits adopted the physical impact and the zone of danger tests, which are likewise based on the common law. *See Restatement (Second) of Torts* § 436A; *Dillon v.*

Legg, 68 Cal. 2d 728, 441 F.2d 912, 69 Cal. Rptr. 72 (1968). In addition, each of these Circuits considered the conduct of the employer and the character of its tortious conduct, such as outrageous acts or the creation of a dangerous situation that culminated in a distressful incident.

However, the Third Circuit has severed all ties to the common law and abandoned any meaningful analysis of the character of the employer's tortious activity. The Third Circuit has ruled that there need be no incident that causes physical impact or the threat of physical impact; there need be no incident that could be characterized as outrageous or unconscionable; there need be no incident during which a plaintiff witnesses a distressful event. Indeed, there need be no incident at all. Rather, the Third Circuit has ruled that general work conditions that create stress can be the basis for liability for emotional injury under the FELA. *Carlisle, supra*, 990 F.2d at 97.

The "tortious acts" that gave rise to liability in *Carlisle* were: reducing the work force; requiring employees to work longer hours; and failing to upgrade railstock and switching equipment. *Id.* at 92. To the Third Circuit, "tortious activity" can therefore include business and management decisions that, in the aggregate, cause stress to certain workers.

Contrary to this Court's instruction to consider both "the nature of the injury and the character of the tortious activity," *Buell, supra*, 480 U.S. at 568, the Third Circuit omitted an analysis of the character of the employer's tortious activity and focused solely on the nature of the plaintiff's injury. The Third Circuit reasoned that as long as the plaintiff can prove that his emotional injury is genuine, the FELA provides a remedy. *Carlisle, supra*, 990 F.2d at 94. The Third Circuit rejected the common law standards that condition recovery for emotional injury on distressful incidents such as being threatened with physical impact

or witnessing a relative suffer injury. *Id.* at 94-95. These common law standards were characterized as mere proxies for determining when a plaintiff suffers a genuine injury, rather than for determining when it is reasonably foreseeable that an employer's conduct would cause emotional injury. *See id.* at 94. By omitting meaningful analysis of the character of the employer's tortious activity, the Third Circuit has significantly expanded the circumstances when liability will be imposed under the FELA.

While the Circuits previously were in conflict regarding which common law test is best suited to define the bounds of recovery under the FELA, now they are in conflict regarding the very existence of such boundaries. This Court should grant certiorari to provide much-needed guidance in this turbulent and confused area of law.

CONCLUSION

For the reasons set forth above, *amici curiae* New Jersey Transit Rail Operations, Inc. and Southeastern Pennsylvania Transportation Authority respectfully request that this Court grant the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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